In the

United States Supreme Court

OCTOBER TERM, 1897.

Waco Horse Lubricant Company, Appellant,

v. No. 181.

Board of Assessors, &c. et al., H. W. Ammunition, &c. Company, Appellees.

PETITION FOR REHEARING.

Geo. R. Peck,
H. T. Hamilton,
A. A. Bowen,
Thos. E. Bowen,
Attorneys for Appellees.

Supreme Court of the United States.

Memorandum.

191 ....., 19

Rehearing.

It seems that the
Pr is right & that
the Ct ought to have
passed on the validity
as applied in the
Concrete figure.

SUPREME COURT OF THE UNITED STATES.

No. 101.—October Term, 1928.

White River Lumber Company, Plaintiff in Error, *vs.* The State of Arkansas *ex rel.* H. W. Applegate, Attorney General.	In Error to the Supreme Court of the State of Arkansas.

[May 27, 1929.]

Mr. Justice Sanford delivered the opinion of the Court.

This case involves a question as to the constitutional validity of the back tax law of Arkansas. Sec. 1 of Act No. 169 of the Arkansas Acts of 1913—which is set forth in the margin[1]—provides that where, because of any inadequate or insufficient valuation or assessment, or undervaluation, of any property which belonged to any corporation at the time taxes thereon should have been properly assessed and paid, there are overdue and unpaid taxes thereon

[1]This section amended § 1 of Act No. 354 of the Acts of 1911, so as to read: "Where the Attorney General is satisfied from his own investigations, or it is made to appear to him by the statement in writing of any reputable taxpayer of the State, that in consequence of the failure from any cause to assess and levy taxes, or because of any pretended assessment and levy of taxes upon any basis of valuation other than the true value in money of any property hereinafter mentioned or because of any inadequate or insufficient valuation or assessment of such property, or undervaluation thereof, or from any other cause, that there are overdue and unpaid taxes owing to the State, or any county or municipal corporation, or road district, or school district, by any corporation upon any property now in this State which belonged to any corporation at the time such taxes should have been properly assessed and paid; that it shall become his duty to at once institute a suit or suits in chancery in the name of the State of Arkansas, for the collection of the same, in any county in which the corporation owing such taxes may be found, or in any county in which any part of such property as may be found, or in any county in which any part of such property as may have escaped the payment in whole or in part of the taxes as aforesaid may be situated . . . ." C. & M. Digest, § 10204. It was also provided by an earlier act that the State and its political subdivisions should have a lien on the property for the payment of such overdue taxes, to be enforced by this suit. C. & M. Digest, § 10207.

owing to the State or a political subdivision thereof by any corporation, the Attorney General shall institute a suit in chancery in the name of the State for the collection thereof.

In July, 1925, the State of Arkansas, proceeding under this section, brought suit in a chancery court, on the relation of the Attorney General, against the White River Lumber Company, a foreign corporation doing business in the State, for the recovery of back taxes. The complaint, as amended, alleged that the Company owned large tracts of valuable timber lands in four counties of the State,[1] which were worth from $30 to $50 an acre but had been undervalued and underassessed for taxation for the years 1915 to 1926, inclusive, at a valuation of about $4 per acre; and prayed judgment for overdue and unpaid taxes for those years at 50 per cent of their true value—the basis of valuation that had been fixed by an order of the State Tax Commission—less the assessments actually made. The Company, answering, denied that there had been any undervaluation; claimed that the lands had been valued on the same basis as like timber lands owned by other individuals and corporations; and alleged that section 1 of the law as attempted to be enforced against it, was repugnant to the due process and equal protection clauses of the Fourteenth Amendment.

The chancery court—finding that for the years in question the value of the lands constituting the "Big Island group,"[2] was $50 an acre, and that of the remaining lands $33.33 an acre, and that the average assessments of other lands in these counties had been at approximately 30 per cent of their value—back assessed the Big Island group at $15 per acre, and the other lands at $10 per acre, less credits for timber stolen and sold and the valuations at which they had been originally assessed, and, declared a lien on the several tracts for the amount of the back taxes due on them, respectively, as thus reassessed.

Upon cross appeals the Supreme Court held that the fact that the statute authorizing suits for back taxes applied only to corporations, did not render it repugnant to the Fourteenth Amendment; that under it the State might maintain suit to recover additional taxes on the ground that there had been an inadequate or insufficient valuation or assessment of the corporate property; that in such case the reassessment should be on the same

[1] These contained 41,500 acres.

[2] These contained 7,964 acres.

basis as that upon which the original and inadequate assessment should have been made; and that as it appeared that all other property was assessed at an average of 30 per cent of its value, the Company's lands, under the uniformity clause of the State Constitution, should be assessed at that per cent, despite the fact that the State Commission had fixed a higher basis. Applying these rules of law the court found from the testimony that it was not shown that there had been any inadequate or insufficient valuation of any of the lands except the Big Island group, but that this group was a body of lands that were unusually well timbered, had a value not possessed by the other timbered lands which were assessed at from $4 to $5 per acre, and "were of an average value, during the entire time covered by the assessments in question, of $40 per acre, taking into account the timber stolen and the timber sold". And holding that they should be assessed at a valuation of 30 per cent of that amount, that is, $12 per acre, less the valuation on which the taxes had been paid, the decree of the chancery court was modified so as to permit a recovery of back taxes on the Big Island group only, and on those lands only to the extent indicated. 175 Ark. 956.

1. It is urged here that the back tax act of Arkansas, in providing for the reassessment of property of corporations by judicial proceedings and the imposition of additional taxes thereon after the payment of the taxes assessed by the duly constituted assessing authorities, and in not providing for such reassessment of property belonging to natural persons, denies to the Company and other corporations the equal protection of the laws in violation of the Fourteenth Amendment.

We cannot sustain this contention. It is unquestioned that the Arkansas statutes providing for the original assessment of property for taxation make no distinction between the lands of corporations and those of natural persons and that it is the duty of the assessing officers to assess them in like manner, according to their value. And the question now presented is merely whether a statute authorizing the collection of back taxes on lands which have escaped their just burden of taxation, is invalid because it is limited to the recovery of additional taxes on the lands of corporations which have been assessed at an inadequate or insufficient valuation, and does not extend to the recovery of such ad-

ditional taxes on the lands of natural persons, which may likewise have been assessed at an inadequate or insufficient valuation. The decision in *Quaker City Cab Co.* v. *Penna.*, 277 U. S. 389, on which the Company chiefly relies, involved merely a question as to the invalidity of the discrimination made by a statute levying an original tax on the gross receipts derived by corporations from their operation of taxicabs. As there was no question whatever as to back taxes and no back tax act was involved, the decision is not controlling in the present case.

In *Whitney* v. *California*, 274 U. S. 357, 370, we said—citing various cases—that: "A statute does not violate the equal protection clause merely because it is not all-embracing. . . . A State may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses. . . . The statute must be presumed to be aimed at an evil where experience shows it to be most felt, and to be deemed by the legislature coextensive with the practical need; and is not to be overthrown merely because other instances may be suggested to which also it might have been applied; that being a matter for the legislature to determine unless the case is very clear. . . . It is not open to objection unless the classification is so lacking in any adequate or reasonable basis as to preclude the assumption that it was made in the exercise of the legislative judgment and discretion." These and like principles have been applied by this Court in four cases dealing directly with classifications made in back tax statutes and similar legislation.

In *Wisconsin & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, 539, in which it was held that a state statute providing for the collection of back taxes on real property without including a like provision for collecting back taxes on personal property, should be sustained, the Court said: "The case is different from that of an ordinary tax law in which there may be some foundation for the claim that the legislature is expected to make no discrimination. . . . For this statute rests on the assumption that, generally speaking, all property subject to taxation has been reached and aims only to provide for those accidents which may happen under any system of taxation, in consequence of which here and there some item of property has escaped its proper burden; and it may well be that the legislature in view of the probabilities of changes in the title or situs

of personal property might deem it unwise to attempt to charge it with back taxes, while at the same time, by reason of the stationary character of real estate, it might elect to proceed against that. At any rate, if it did so it would violate no provision of the Federal Constitution. . . ."

In *New York State* v. *Barker*, 179 U. S. 279, 285, a general state statute imposed a tax on the real estate of individuals and corporations upon its full and true value as found by the assessors. In the case of individuals no resort was permitted to any other proceeding by which the tax could be increased by any subsequent assessment on the difference between the assessed and the actual value. But in the case of corporations, if real estate should be mistakenly assessed at an undervaluation another statute afforded an opportunity to reach the difference between the assessed and actual value by making an assessment upon the actual value of the corporate capital, including the real estate. The only claim was that "in this opportunity to correct a mistaken assessment upon its real estate in the case of a corporation when assessed upon its capital, which does not exist in the case of an individual, the corporation is denied the equal protection of the laws." In overruling this contention the court said: "The mere fact that the law gives the assessors in the case of corporations two chances to arrive at a correct valuation of their real estate, when they have but one in the case of individuals, cannot be held to be a denial to the corporations of the equal protection of the laws, so long as the real estate of the individual is, in fact, generally assessed at its full value."

In *Florida Central, &c. R'd Co.* v. *Reynolds*, 183 U. S. 471, 480, in which it was held that in so far as the Federal Constitution was concerned the legislature had the power to compel the collection of delinquent taxes from railroad companies for certain years, even though it made no provision for the collection of delinquent taxes for those years on other property, the Court, quoting with approval from the *Winona Land Co.* case, said: "If the State, as has been seen, has the power, in the first instance, to classify property for taxation, it has the same right of classification as to property which in past years has escaped taxation. We must assume that the legislature acts according to its judgment for the best interests of the State. A wrong intent can not be imputed to it. It may

have found that the railroad delinquent tax was large, and the delinquent tax on other property was small and not worth the trouble of special provision therefor. If taxes are to be regarded as mere debts, then the effort of the State to collect from one debtor is not prejudiced by its failure to make like effort to collect from another. And if regarded in the truer light as a contribution to the support of government, then it does not lie in the mouth of one called upon to make his contribution to complain that some other person has not been coerced into a like contribution."

In *Ft. Smith Lumber Co.* v. *Arkansas*, 251 U. S. 532, 534, the State, proceeding under the statute here involved, had brought suit against a corporation to recover back taxes alleged to be due upon a proper valuation of its capital stock by reason of the fact that in assessing its value there had been omitted the value of stock owned by the corporation in two other corporations, each of which had paid full taxes. The corporation defended "on the ground that individuals are not taxed for such stock or subject to suit for back taxes, and that the taxation is double, setting up the Fourteenth Amendment." This Court, in overruling the defense "with regard to confining the recovery of back taxes to those due from corporations," said: "It is to be presumed, until the contrary appears, that there were reasons for more strenuous efforts to collect admitted dues from corporations than in other cases, and we cannot pronounce it an unlawful policy on the part of the State. See *New York* v. *Barker*, 179 U. S. 279, 283."

We see no ground for distinguishing the *Ft. Smith Lumber Co.* case from that now under consideration, and on that authority and for the reasons stated therein and in the earlier cases which we have cited, hold that the back tax statute of Arkansas, although confined to the property of corporations, does not deny to them the equal protection of the laws in violation of the Fourteenth Amendment.

2. It is also urged in behalf of the Company, that even if the back tax statute be valid on its face, it was so applied by the Supreme Court of the State in the present case, by selecting thirty-four tracts of land, constituting the Big Island group, and reassessing the same on the basis of their average value for twelve years on an average basis of assessment instead of assessing them in accordance with the Arkansas statutes according to the actual valu

of each separate tract for each separate year on the actual basis of assessment for that year, as to constitute a denial of the equal protection of the laws. It does not appear, however, from the record that this constitutional question was presented in or passed upon by the Supreme Court of the State; and as it was sought to raise this question for the first time by assignments of error in this Court, it is necessarily excluded from our consideration. *Whitney v. California, supra,* 316; and cases therein cited.

3. No other federal question is presented by the record for our consideration. The decree is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 101.—October Term, 1928.

White River Lumber Company, Plaintiff in Error, vs. The State of Arkansas *ex rel.* H. W. Applegate, Attorney General.	In Error to the Supreme Court of the State of Arkansas.

[May 27, 1929.]

Mr. Justice Butler, dissenting.

Plaintiff in error attacks a provision of an Arkansas statute,* on the ground that it is repugnant to the equal protection clause of the Fourteenth Amendment.

It directs that, where because of undervaluation there are overdue and unpaid taxes upon any property which belonged to a corporation at the time such taxes should have been assessed and

*The original Act was passed in 1887. Laws 1887, p. 33. There was an amendment in 1911, which is not material here. Laws 1911, p. 324. It was again amended in 1913. Laws 1913, p. 724. (The words added by the last amendment are italicized, and those omitted by it are included in brackets.)

"Where the Attorney General is satisfied from his own investigation or it is made to appear to him by the statement in writing of any reputable taxpayer of the State, that in consequence of the failure from any cause to assess and levy taxes, or because of any pretended assessment and levy of taxes upon any basis of valuation other than the true value in money of any property hereinafter mentioned, *or because of any inadequate or insufficient valuation or assessment of such property, or undervaluation thereof*, or from any other cause, that there are overdue and unpaid taxes owing to the State, or any county or municipal corporation, or road district, or school district, by any corporation, [or] upon any property now in this State which belonged to any corporation at the time such taxes should have been properly assessed and paid, it shall become his duty to at once institute a suit or suits in chancery in the name of the State of Arkansas, for the collection of the same, in any county in which the corporation owing such taxes may be found, or in any county in which any part of such property as may have escaped the payment in whole or in part of the taxes as aforesaid may be situated, in which suit or suits the corporation owing such taxes, or any corporation [or person] claiming an interest in any such property as may have escaped taxation as aforesaid, shall be made a party defendant. . . ." § 10204 Crawford & Moses' Digest.

paid, the Attorney General shall bring a suit to collect them unless the title passes to an individual before suit. No law of the State creates or permits the enforcement of any like or similar liability against the property of individuals. The fact that the property is owned by a corporation is the sole basis of the classification. The claim here is for additional taxes upon land, and the land alone is liable. The owner cannot be held for either the original or back taxes. See decision below, 175 Ark. 956, 973. Like lands of individuals are shown to have been grossly underassessed. And if such lands were owned by corporations, they would be liable for back taxes.

The discrimination is deliberate. The statute, passed in 1887, is entitled "An Act to provide for the collection of overdue taxes from corporations doing business in this State". It was amended in 1913. In *State ex rel. Attorney General* v. *K. C. & M. Ry. and Bridge Co.*, 117 Ark. 606, the court said (p. 613): "The object of the amendatory act of 1913 was to give a complete remedy for the recovery of back taxes due by a corporation upon any property then in the State, which belonged to any corporation at the time such taxes should have been properly assessed and paid. It takes away the right conferred by the original act to proceed against property where the title had passed to an individual, although it had been owned by a corporation when the assessment was made and the taxes were payable . . .". And see concurring opinion, *State ex rel. Attorney General* v. *Bodcaw Lumber Co.*, 128 Ark. 505, 523.

This suit was brought in 1925; its original purpose was to recover from plaintiff in error additional taxes, for each of the 10 years ending with 1924, on the value of the company's "capital stock or intangible property". The complaint stated that plaintiff in error had paid taxes upon its real and personal property. It alleged that the assessed value of its tangible property "upon which defendant had actually paid taxes as provided by statute" was much less than the market value of its capital stock, and judgment was demanded against plaintiff in error for back taxes on such intangibles.

But it was found that the company had no property in Arkansas other than real estate, and about the same time the state supreme court, in *State* v. *Lyon Oil and Refining Co.*, [1926] 171

Ark. 209, held that the capital stock of a foreign corporation which is neither located nor used within the State cannot be taxed therein.

Then the complaint was amended to allege that the company owned timber lands in Arkansas which had been underassessed in each of the 12 years ending with 1926. The chancery court charged the lands with back taxes. The supreme court held that there had been undervaluation of only a part of the company's lands and that the amount of back taxes imposed by the decree should be reduced accordingly.

Such taxes are imposed upon the sole ground that through mistake the original assessments were too low. The procedure for the enforcement of taxes on land is not affected by the character of the owner; the State looks only to the land. Lands of individuals are as likely to be erroneously undervalued as are those belonging to corporations. But the law directs the Attorney General to collect back taxes not in all cases where the taxes originally levied and paid were based on undervaluation, but only where property belongs to corporations at the time of the assessment and also at time of suit. He is not permitted to bring suit to make such collections against lands owned by individuals even if they were owned by corporations when undertaxed. As here applied, the Act singles out the lands of a corporation, leaving those of natural persons free from such claims. Transfer to an individual, whenever made, prevents the operation of the Act.

This case cannot be distinguished from *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389. There the tax in controversy was imposed upon the corporation's gross receipts derived from the operation of taxicabs. But the gross receipts of individuals in the same line of business were not taxed. And for that reason the law was held repugnant to the equal protection clause. The Court said (p. 402): "Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations as are taxes on their capital stock or franchises. . . . The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference . . . in the situation or char-

acter of the property employed." It is not pretended that such back taxes on lands of individuals may not be imposed as conveniently as upon those of corporations. The Arkansas law imposes a tax liability on lands of a corporation to which lands of an individual are not subjected. That case rules this one.

But there are cited in support of the decision below *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526; *New York State* v. *Barker*, 179 U. S. 279, 285; *Florida Central, &c. R. R. Co.* v. *Reynolds*, 183 U. S. 471, 480; and *Fort Smith Lumber Co.* v. *Arkansas*, 251 U. S. 532, 534.

Winona & St. Peter Land Co. v. *Minnesota*, *supra*, did not present any question under the equal protection clause. A state law provided generally for the assessment and taxation of both real and personal property which had been omitted from the tax roll. Lands of the company were assessed under the Act. It insisted (p. 528) that the Act violated the contract clause and the due process clause.

In support of the latter contention, the company argued that, as to back taxes on personal property, the Act was invalid because it failed to provide for notice to owners before the charges were fixed against them; that it could not be assumed that the legislature would attempt to enforce back taxes against lands alone, and that therefore the whole Act fell. But the state court declined to pass upon that contention, 40 Minn. 512, 521, and held that in any event back taxes on personal property might be enforced by an ordinary personal action. This court said (p. 539): "It seems to us . . . that the assumption that it cannot be believed that the legislature would never seek to provide for the collection of back taxes on real property without at the same time including therein a like provision for collecting back taxes on personal property, cannot be sustained. The case is different from that of an ordinary tax law in which there may be some foundation for the claim that the legislature is expected to make no discrimination, and would not attempt to provide for the collection of taxes on one kind of property without also making provision for collection of taxes on all other property equally subject to taxation . . . and it may well be that the legislature in view of the probabilities of changes in the title or situs of personal property might deem it unwise to attempt to charge it with back taxes, while at the same

time, by reason of the stationary character of real estate, it might elect to proceed against that." The court concluded that in any event it was for the state court to determine whether the Act was severable.

Both in Minnesota and Arkansas, taxes and back taxes on personal property are enforceable against the owner; taxes and back taxes on land are enforced only against the land. The Minnesota Act did not attempt to make any classification. Moreover, a discrimination between personal property and land is essentially different from that attempted by the Arkansas statute. The equal protection clause does not require that, for purposes of taxation, land must be put in the class with merchandise, moneys, credits, livestock and other personal property. The differences in kind are sufficient to warrant classification.

In *New York State* v. *Barker*, *supra*, the controversy concerned an assessment of a corporation's capital stock. It was a proceeding against the corporation itself. There was no question in the case of increasing, reassessing or collecting taxes on land. The real estate of corporations and individuals was directly assessed, and the law required this assessment to be at actual value. In addition, there was imposed on corporations a capital stock tax, to be determined by deducting from total value of all its property, tangible and intangible, its debts and the assessed value of real estate, the remainder to be taxed as capital stock.

The taxing officers found the "actual value" of real estate to be $965,000 and added other property, making total gross assets, $1,095,049; they deduced debts, $329,050, and "assessed value" of real estate, $600,000, leaving $165,999, to be taxed as capital stock. The corporation insisted that in determining total gross assets the assessed value of the real estate should be substituted for its actual value; that would leave nothing to be taxed as capital stock.

Its contention was that the taking of its real estate at actual value instead of assessed value denied to it equal protection of the laws. This court pointed out (p. 284) that the failure to assess the company's real estate at its actual value for separate taxation and the use of actual value to ascertain the capital stock tax could work no denial of equal protection if the real estate of individuals was in fact assessed at its full and true value as re-

quired by law. And it said: "There is no allegation . . that there has been any undervaluation of real estate, either with regard to individuals or corporations. . . . (p. 285). But we are . . asked . . in the absence of allegations or proof of habitual, or indeed of any undervaluation, to assume or take judicial notice of its existence, notwithstanding such undervaluation would constitute a clear violation of the law of the State. . . . (p. 286). Whether, if the case were proved, as assumed by counsel, it would in fact amount to any such discrimination against corporations as to work a denial to the plaintiff of the equal protection of the laws, is a question not raised by this record, and, therefore, not necessary to be decided." It requires no discussion to show that this case is not in point.

Florida Central, &c. Railroad Co. v. *Reynolds, supra*, considered a Florida statute providing for collection of back taxes on railroad properties. The single question was (p. 474) whether to reach backward and collect taxes from certain kinds of property without also making provision for collecting taxes on other kinds of property transgressed the equal protection clause. It was held, as is well understood, that railroads so differ from other kinds of property that they may be separately classified. The case has no bearing here.

In *Fort Smith Lumber Co.* v. *Arkansas, supra*, the suit was to enforce an obligation of the corporation itself and not merely a claim for taxes against its land. The company in that case owned stock in two other Arkansas corporations and claimed it was entitled to omit such shares from the taxable value of its own stock. It defended on the ground that individuals are not taxed on such stock or subject to suits for back taxes. The Court said: "If the State of Arkansas wished to discourage but not to forbid the holding of stock in one corporation by another and sought to attain the result by this tax or if it simply saw fit to make corporations pay for the privilege, there would be nothing in the Constitution to hinder. . . . The same is true with regard to confining the recovery of back taxes to those due from corporations. It is to be presumed, until the contrary appears, that there were reasons for more strenuous efforts to collect admitted dues from corporations than in other cases, and we cannot pronounce it an unlawful policy on the part of the State".

This court assumed that the special burden was imposed in pursuit of a definite purpose on the part of the State in respect of incorporated owners of stock in Arkansas corporations. That decision rests upon the ground that the tax was peculiarly applicable to corporations. But a tax on land is not.

As the back taxes claimed are enforceable only against the land, there is no basis for the suggestion that there exists here any reason for more strenuous efforts to collect from corporations than from natural persons.

And there is no basis for an assumption like that made in the *Fort Smith Lumber Co.* case. The classification, at least when applied to land, is fanciful and capricious. *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 114.

The decree should be reversed.

The CHIEF JUSTICE and Mr. Justice VAN DEVANTER concur in this opinion.

IN THE

United States Supreme Court

OCTOBER TERM, 1928.

WHITE RIVER LUMBER COMPANY ..... *Appellant*,

v. No. 101.

STATE OF ARKANSAS, EX REL., H. W. APPLEGATE, AS ATTORNEY GENERAL ..... *Appellee*.

PETITION FOR REHEARING.

Comes the appellant and prays that a rehearing be granted herein, and for cause says:

Specifications of error Nos. 3, 4, 5, 6 and 7, question the validity of the back tax statute of Arkansas, as applied by the Supreme Court of Arkansas in this case. This Honorable Court has declined to pass upon the questions raised by said specifications of error, for the reason stated in the opinion, as follows:

> "It does not appear, however, from the record that this constitutional question was presented in or passed upon by the Supreme Court of the

> State; and as it was sought to raise this question for the first time by assignments of error in this court, it is necessarily excluded from our consideration."

The question involved did not arise until the decision of this case by the Supreme Court of Arkansas, and consequently could not have been raised by appellant prior to that time, nor in any other way than by a petition for rehearing in that court. A petition for rehearing was duly filed. This petition set out in detail the effect of the decision and the resulting violation of Section 1 of the 14th Amendment to the Constitution of the United States. For convenience of the Court, a copy of that part of the petition material to this question is printed as an appendix to this petition.

That petition for rehearing was submitted on briefs, although the briefs are not a part of the record here. On January 30, 1928, the Supreme Court of Arkansas made an order in reference thereto as follows (Rec. p. 255):

> "The petition for rehearing heretofore filed in this cause being called, is now submitted with the response and briefs filed, and is by the Court taken under advisement."

On February 13, 1928, the Supreme Court of Arkansas overruled the petition for rehearing by the following order (Rec. p. 256):

> "Being fully advised the petition for rehearing filed in this cause, is by the Court overuled."

The petition for rehearing and the order overruling same were certified to this Court as a part of the record on this appeal. (Original record, pp. 369-380).

Therefore, it affirmatively appears from the record filed in this Court that the Supreme Court of Arkansas had the petition for rehearing, submitted on briefs, under advisement for two weeks. The petition was denied without an opinion, but it could not have been denied without a decision of the Federal questions raised by the petition, and a denial of the rights asserted by appellant under the Federal Constitution. This method of raising a Federal question in a state court has always been considered sufficient to present the question to this Court for decision.

Whitney v. *Calif.*, 274 U. S. 357;

Marvin v. *Trout*, 199 U. S. 212;

Consolidated Turnpike Company v. *N. & O. V. Ry. Co.*, 228 U. S. 596.

"The record shows that the question was raised and the certificate shows that it was not treated as having been raised too late under the local procedure, a point upon which the State court is the judge. It is enough that the Federal question was raised and necessarily decided by the highest court of the State."

Cincinnati Packet Co. v. *Bay*, 200 U. S. 179.

"But since the court of last resort of the State actually dealt with and passed upon the question raised by plaintiff in error as to the validity of the statute upon the ground of its being repugnant to the Constitution of the United States, and decided in favor of its validity, it is clear that, un-

der the first paragraph of Sec. 237, Judicial Code, as amended by Act of September 6, 1916, c. 448, 39 Stat. 726, we have jurisdiction to pass upon the question, and the motion to dismiss must be denied. *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243; *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 257."

C., R. I. & P. Ry. Co. v. *Perry*, 259 U. S. 548,

A statement of points to be relied upon in this Court was filed pursuant to paragraph 5 of rule 13 of this Court. Attached to and made a part of said statement was an agreement between counsel, reading as follows (Rec. p. 265):

> "It is agreed by the parties hereto that the entire record in this case is necessary for the consideration of the points involved."

Notwithstanding the agreement of counsel, above set forth, the clerk of this Court did not incorporate the said petition for rehearing in the printed record, but referred thereto on page 255 of the record as follows:

> "(Fols. 369-380). Petition for rehearing, covering twelve pages, filed January 23, 1928, omitted from this print. It was denied and nothing more by order February 13, 1928."

Upon inquiry of the clerk, having in charge the printing of records, as to why this petition for rehearing had been omitted, counsel for appellant was informed that the omission was made pursuant to instructions from this Court, to the effect that petitions for rehearing should not be printed in the record.

Attention was called to the petition for rehearing on page 10 of appellant's brief. The assignments of error covering this question were argued in the briefs of both parties and, as much as time would permit, in the oral argument, and at no time was it contended that the question had not been properly raised.

We submit, therefore, that the Federal question involved is shown by the record to have been properly raised in the Supreme Court of Arkansas and to have been properly certified to this court. If, under the requirements of this court, the petition for rehearing which was filed in the state court should have been in the printed record in this court, the failure in that regard is not chargeable to appellant, because such petition for rehearing was included in the parts of the record designated by the parties to be printed.

Appellant prays, therefore, that a rehearing be granted and that the court consider the questions raised by its specifications of error hereinbefore referred to, and, pending a rehearing, that the mandate herein be withheld.

Respectfully submitted,

GEO. B. PUGH,
H. T. HARRISON,
A. S. BUZBEE,
THOS S. BUZBEE,
Attorneys for Appellant.

I, Thos. S. Buzbee, one of the attorneys for appellant in this cause, hereby certify that the above petition is filed in good faith and not for delay.

Thos S Buzbee

APPENDIX

PETITION FOR REHEARING

Filed in the Supreme Court of Arkansas, as shown by Original Record in this court, pages 369-380.

Appellant respectfully prays this Honorable Court to reconsider its decision rendered in the above entitled cause on the 9th day of January, 1928, and to grant it a rehearing, and as grounds for this petition, states: (omitting parts not now material).

II.

1. Sections 9919, 9924 and 10009, C. & M. Digest, provide that each tract of land shall be assessed separately.

Section 9924, C. & M. Digest, directs every assessor, on or before the second Monday in September in the year 1887, and every second year thereafter, to assess all real property in the manner therein described, to set out the names of the owners, the description of each tract by section, or the largest subdivision of which the same is capable, designating the numbers of the section and the part thereof, and to make, in connection therewith, the following affidavit: "I_____, assessor do solemnly swear that the foregoing is correct and that I have appraised each tract or lot of land,

except United States or State lands, at its true value in money, and not at what it would bring at auction or at a forced sale, so help me God."

Act 234 of the Acts of 1917, as amended by Act 147 of the Acts of 1919, directs that real property shall be assessed each year instead of every two years, and taxpayers are given the right of appeal from assessments made in each year.

Section 9866, C. & M. Digest, directs the county court of each county to meet annually, on the first Monday in October, for the purpose of levying the county taxes.

Sections 8950, *et seq.*, C. & M. Digest, direct that school districts shall hold elections each year "to determine what amount of money shall be raised by tax on the taxable property of the districts," etc.

Sections 9864 and 9865, C. & M. Digest, direct that all levies of taxes in cities and towns shall be based upon the appraisement of the county assessor.

Section 9870, C. & M. Digest, authorizes any person having real or personal property assessed for taxation to appear before the county court at the time of the levy of taxes by it, or at the succeeding term thereafter, and object to the levy of any specific tax for illegality.

The levy of taxes on lands in the so-called Big Island group varies from 20 3-8 mills in 1915 to 29.7 mills in 1926. In 1916 levies on lands in the same group vary from 20 3-8 mills to 22 3-8 mills; in 1917, from 15½ mills to 27½ mills in 1918, from 15½ mills to 27½ mills; in 1919, from 22.7 mills to 27.7 mills; in 1920, from 25.7 mills to 27.7 mills; in 1921, from 23.7 mills to 28.7 mills (Tr., pp. 390 to 402).

The decision of this court has directed an assessment on thirty-four separate tracts of land, located in eighteen separate sections, for twelve separate years.

The court cannot find such values from the testimony, for the following reasons, one of which is stated by the court in its opinion as follows:

"It was also shown that during the years for which the State asks back assessments large quantities of the timber had been stolen, and that in recent years large quantities had been sold, and that the value of the lands was proportionately reduced * * *. No attempt was made to show from what tracts of land timber had been sold or stolen."

The latter statement must be qualified by the uncontradicted testimony of witness Keaton that Section 22 and the Northwest Quarter of Section 23, T. 4 S., R. 1 W., containing 549.36 acres, was logged in 1920. Descriptions of other lands logged or from which timber was cut on Big Island are not given.

No witness has undertaken to state the value of any land prior to the year 1920. The years 1915, 1916, 1917, 1918 and 1919 are not mentioned by any witness in connection with the value of any tract of land, except that witness Dennison stated that 1919 was a good year for logs.

The court in its decision has disregarded the requirements that each tract of land shall be assessed separately for each year for which assessments were made, and has fixed an arbitrary average value covering thirty-four different tracts of land for twelve annual assessment periods.

The result of this decision is:

First: To charge some tracts of land which belong to the defendant, such as the sections which have been cut over, with an excessive assessment, because of the fact that defendant owns other tracts of land which may be more valuable.

Second: To charge an excessive assessment against the lands of defendant for some of the years because said lands have been more valuable in other years.

Third: The testimony is uncontradicted that defendant owns over 40,000 acres of land; that this land is in a continuous body; that hundreds of acres of said land have never had any timber on them; that a great deal of the timber on the other lands has been stolen and much of it has been cut, rendering the lands prac-

tically worthless. Twenty-one thousand acres of this land is in Arkansas County. If it be assumed that the court is authorized on any theory to average the value of lands belonging to defendant, the court has discriminated against defendant by selecting from defendant's lands one-third of the best lands in Arkansas County upon which to base an average instead of taking all of the defendant's lands or at least all in that county.

Fourth: The court has necessarily charged the less valuable of defendant's lands, which lie in one school or taxing district with an excessive and exorbitant tax, because defendant owns lands in other districts which may be more valuable. The lands in the so-called Big Island group are in three school districts with different levies in each district. The court has undertaken to average the values in each district, but cannot average the levies.

Fifth: The court, in fixing an assessment on defendant's lands based on an average of twelve years, has fixed an erroneous and arbitrary average, by failing to take into consideration the value of said lands during the period which said lands have been owned by defendant prior to 1915 or may be owned by it subsequent to 1926.

Sixth: The decision of the court has increased the assessable value of property in the school districts or other taxing districts in which the lands of defendant are located $77,449.20 for the year 1915, and pro-

portionate amounts for subsequent years. The levies of taxes for each of said years were based upon the assessed value of the property in the district or districts for the years in which said levies were made. The court, in increasing the assessed value of property in said district, has necessarily changed the amount of taxes which the various levying bodies would have been required to levy and, in doing so years after the time permitted by statute to object to said levies has expired, has denied to this defendant the right to object to said levies and have same reduced to an amount justified by the increased valuation.

Seventh: The uncontradicted testimony shows that Big Island contains approximately 9,000 acres; that defendant owns thereon approximately 7,200 acres (Keaton's testimony, Tr., p. 136); that the other land on Big Island and other large tracts of land in Arkansas County are as valuable as the land of defendant and are assessed at from four to five dollars per acre only. The decision of the court, therefore, has assessed the property of defendant at a higher rate than other property of like character and like value has been assessed.

2. The court by its decision has ordered that lands described as E. of Chute, South-half, South-half, Section 22, Twp. 4 South, Range 1 West, shall be assessed at $3,104.16; that E. of Chute, North-half, South-half, Section 22, Twp. 4 South, Range 1 West, shall be assessed at $1,389.96; that N. of Chute, part of fractional

Northwest Quarter of Section 23, Township 4 South, Range 1 West, shall be assessed at $889.56 and that South-half, Northwest-half, Section 23, T. 4 S., R. 1 W., shall be assessed at $960.00, all of these assessments to be made for each of the years 1915 to 1926, inclusive. These tracts total 528.64 acres. The only reference to these tracts made in the testimony is in the uncontradicted testimony of witness Keaton (Tr., p. 135) as follows:

> "We logged Section 22, and Northwest Quarter of Section 23, Twp. 4 South, Range 1 West, 549.36 acres. We logged that in 1920."

According to the testimony of every witness who testified on the subject, cut-over lands were practically worthless, and, therefore, these lands could not have been worth $40.00 per acre in the years 1921, 1922, 1923, 1924, 1925 and 1926. The levy of taxes against these tracts of lands has been increased from 23.7 mills in 1921 to 29.7 mills in 1926. The court, in denying the appellant the right to have these tracts of land assessed separately for each year and directing the assessment of said tracts of land on the basis of an average value in combination with other tracts of lands, has charged said tracts with an excessive assessment for six years, at a rate of taxation higher than was levied when said tracts had timber.

The same discrimination exists as to all other tracts of land embraced in the decision of the court, which for any reason have become less valuable than

the so-called average during any of the years 1915 to 1926, inclusive.

3. The Chancellor included in lands in the so-called Big Island group 537.81 acres of land in Section 22, Twp. 4 South, Range 1 West, which are not on the island lying between White River on the East and the Chute on the West. This is the island which the court has found to be Big Island. We do not know whether the decision of this court contemplates that said land in Section 22 shall be included within the Big Island group or not. If so, we submit, first, that there is no testimony identifying this land in any manner, or showing an equal or comparative value with lands on Big Island; and, second, that the decision of the court, in directing the assessment of said lands at $12.00 per acre, discriminates against the lands of this appellant, because all other land of like character is assessed at only four to five dollars per acre.

For the reasons above stated, the decision of the court denies to appellant the benefit of the uniformity clause of the Constitution of the State of Arkansas, and denies to appellant the equal protection of the law, and the same is, therefore, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

4. The effect of the decision of the court in increasing the assessments of lands of defendant for each of the years 1915, 1916, 1917, 1918 and 1919, without any testimony upon which to base said increases, and

basing the assessments for all years and on all tracts upon a system of averages instead of actual values for each year and each tract, is to deprive appellant of its property without due process of law, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

If the court is of the opinion that there is clear and satisfactory evidence that some lands on Big Island belonging to the defendant have been underassessed, and, for that reason, that the case should not be dismissed, then the court should reverse and remand the case, for the purpose, either:

First, of having such underassessment determined as to each tract of land for each of the years involved, in accordance with the statutes and in the same manner that assessments are required to be made in the first instance against property of all other persons; or,

Second, if the court holds that such underassessment can be established on a basis of averages for either territory or time, then the court should lay down the rule by which such averages can be established, giving the limits as to time or territory and affording the defendant an opportunity to introduce testimony and make its defense on that basis. The average theory which the court adopts in this case, has not been suggested by any statute or decision of this State prior to this time and appellant has therefore had no opportunity to introduce much testimony which can be obtained to support its defense on that theory.

WHEREFORE, appellant prays that the decision heretofore rendered be set aside and that this case be reversed and dismissed, or that it be reversed and remanded as to lands in the so-called Big Island group, with directions as to further proceedings, or, in any event, that the decree be modified to permit an assessment on the basis of not more than $7.50 per acre, being 30 per cent of $25.00 for the years 1920 to 1926, inclusive.

Respectfully submitted,

BUZBEE, PUGH & HARRISON,

Attorneys for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

WHITE SEWING LOCKING COMPANY, *Appellant*,

v. No. 102

STATE OF ARKANSAS, EX REL. H. W. APPLEGATE, AS ATTORNEY GENERAL, *Appellee*.

APPELLANT'S STATEMENT IN RESPONSE ON PETITION FOR REHEARING

GEO. B. PIERCE,

TROY S. BUTLER,

Attorneys for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

WHITE RIVER LUMBER COMPANY ..... *Appellant*,

v. No. 101

STATE OF ARKANSAS, EX REL H. W. APPLEGATE, AS ATTORNEY GENERAL ..... *Appellee*.

APPELLANT'S STATEMENT IN RESPONSE ON PETITION FOR REHEARING

In view of some apparently conflicting statements in the petition for rehearing and the response thereto made by appellee, we feel justified in asking the court to permit us to file a short statement in reply.

The petition for rehearing states that the questions involved in the specifications of errors referred to did not arise until the decision of the case by the Supreme Court of Arkansas (Petition for Rehearing, p. 2). The opposition to the petition filed by appellee states (p. 4) that the statement is not true, because the same questions of fact and law were presented to both the chancellor and the State Supreme Court and that necessarily the same questions arose. The statement of appellee is correct. The statement in the petition had reference to raising the questions *on the record* and probably should have been qualified by stating that the

questions were raised *on the record* at the first opportunity. The arguments in the Chancery and Supreme Courts are not part of the record.

The answer filed in the State Chancery Court alleged the unconstitutionality of the Act of Arkansas as attempted to be enforced in this case (Rec. p. 18), and that issue was tried in the chancery court. On an appeal from a chancery court in Arkansas, there is no motion for new trial or assignment of errors. The whole record is taken up and the case is tried by the Supreme Court *de novo*. The rule is stated by the Supreme Court of Arkansas in the case of *Leach* v. *Smith*, 130 Ark. 465, as follows (p. 469):

> "In law cases the jury, in the first instance, are triers of fact, and the trial judge, on a motion for a new trial, may review the evidence to determine whether the verdict is against the preponderance thereof. This court, on appeal, in law cases, leaves the jury and the presiding judge to weigh the evidence and decide as to its preponderance. This is peculiarly their function, and we do not set aside the results thus attained where there is any evidence at all of a substantial character; that is, legally sufficient, to sustain the finding on the issues of fact. In other words, in law cases this court, on appeal for review for errors, is not a trier of facts.
>
> "But in chancery causes the procedure is entirely different. When chancery causes reach this court on appeal they are taken up for trial *de novo* on the record made up in the lower court, that is, on the same record, but the law and the facts are examined the same as if there had been no decision at *nisi prius*."

The peculiar construction of the Act of Arkansas resulting in the discrimination complained of by the specifications of errors referred to was first made by the Supreme Court of Arkansas in the decision under review, and the objections to that decision were placed of record at the first opportunity. Counsel for appellee admit that the questions were presented to the Supreme Court of Arkansas (appel-

lee's response, p. 4) and do not suggest that the questions could or should have been raised in any other way. The case could not have been decided either on the original hearing or on the petition for rehearing without a decision of those questions against the contention of appellant. It is true that the Supreme Court, in overruling the petition for rehearing, did not render an opinion, but this is a matter which could not be controlled by appellant, and the appeal provided for to this court is from the decision of the State Court and not from the opinion.

We submit that the construction placed upon the Arkansas act by the Supreme Court of Arkansas for the first time in the decision rendered in this case and the enforcement of the act under that construction has denied to appellant the equal protection of the law; that appellant has adopted every known method of presenting the question to this court, and the petition for rehearing should be granted.

Respectfully submitted,

GEO. B. PUGH,

THOS. S. BUZBEE,

Attorneys for Appellant.